

This letter discusses nexus. See *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992). (This is a GIL).

December 16, 2005

Dear Xxxxx:

This letter is in response to your letter dated April 1, 2005, in which you request information. The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at www.tax.illinois.gov to review regulations, letter rulings and other types of information relevant to your inquiry.

The nature of your inquiry and the information you have provided require that we respond with a GIL. In your letter you have stated and made inquiry as follows:

I am writing to request a letter ruling to confirm if nexus exists in the State of Illinois for the company, ('COMPANY'), I represent such that it would be considered to have established substantial nexus and be a retailer maintaining a place of business in the State of Illinois based on the facts and discussion presented below.

FACTS

COMPANY operates an online website which allows users to access a database it internally created to search for various documents that are of interest to the users. In addition, individuals can create and maintain their own website. On the COMPANY's website, the COMPANY sells various items such as computer software, books, periodicals and other miscellaneous tangible personal property related to the database they have created. COMPANY charges customers for using the information on its website. This charge is normally a monthly, semi-annual or an annual fee paid by users. For this charge users get access to various parts of its database on the website. Users can print various documents as they wish. The general service COMPANY provides is the provision of information services with some sales of shrink-wrapped software, periodicals and other hard goods.

COMPANY's operations in Illinois are limited to two employees, one who has resided in the state for several years and another who began working in the state towards the end

of 2004. The first employee is the COMPANY's executive editor for magazines and newsletters published by the COMPANY. This person also functions as a liaison with the community of individuals who have interest in the COMPANY's subject matter.

The second individual functions as the editor of an online daily newsletter which is available free of charge to the public and is associated with COMPANY's website. There is no cost to access the newsletter which is provided as a service to those interested in general topics which are also related to the COMPANY's area of collected information. As stated, access to the newsletter is without cost and does not require an individual to purchase anything from the COMPANY. Both employees work from home on employer-owned computers.

COMPANY has no other employees, agents, equipment, inventory, offices or other fixed place of business located in Illinois. The COMPANY employees in Illinois access, via a secure network, COMPANY's servers located outside of Illinois to perform their duties. These individuals could perform their job duties anywhere in the world. As stated, the employees do not solicit sales from current or potential customers.

APPLICABLE LAW AND REGULATIONS

A state's authority to require the collection of sales tax is derived from state constitutional and statutory provisions; however the U.S. Constitution limits the extent of this power. For Illinois to impose the collection of sales or use tax on out-of-state activities, the United States Constitution requires the taxable activity or item to have sufficient nexus or substantial connections with the state.¹

Nexus is a requirement for taxation of interstate transactions under both the Commerce Clause and Due Process Clauses. The Commerce Clause nexus standard, which is the first prong of the *Complete Auto Transit* test, is that a tax may be applied to an activity having a substantial nexus with the taxing state. The Due Process Clause nexus standard, as set out in *Miller Brothers Co. v. Maryland* (1954) 347 US 340, is that a minimum connection must exist between a state and the person, property, or transaction that the state seeks to tax. In addition to substantial nexus, a state's tax must be nondiscriminatory, must be fairly apportioned, and must be fairly related to benefits provided by the state.

Sufficient nexus usually exists when an out-of-state vendor has a physical presence, either by employees or tangible property in the customer state.² However, the United States Supreme Court has allowed a slight level of physical presence in a customer state without triggering nexus for an out-of-state taxpayer.³ While there are several cases that have provided some guidelines as to what types of transaction will fall into the 'safe harbor' category, there has been no definite guidance from the United States Supreme Court regarding how much physical presence will be allowed before the slightest presence test will be met and nexus found. The United States Supreme Court stated, 'The crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales.'⁴

¹ See *Quill Corp. v. North Dakota*, 504 U.S. 298, 298 (1992).

² *Id.*

³ *Nat'l Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551, 560 (1977).

⁴ *Tyler Pipeline Industries, Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 250-51 (1987).

ANALYSIS/CONCLUSION

A corporation is doing business in this state when it has sufficient contact with this state to be taxed without violating the United States Constitution. In order for COMPANY to have an Illinois sales and use tax collection responsibility, substantial nexus must exist between COMPANY's taxable sales activities and the state.

I respectfully request that the state issue a ruling determining the status of the COMPANY's Illinois nexus for sales and use tax collection purposes.

Please feel free to contact me if you have any questions or need any additional information.

DEPARTMENT'S RESPONSE:

Determinations regarding nexus are very fact specific and cannot be addressed in the context of a General Information Letter. The Department has found that the best manner to determine nexus is for a Department auditor to examine all relevant facts and information. The following guidelines, however, may be useful to you in determining whether your company would be considered "a retailer maintaining a place of business in Illinois" subject to Use Tax collection obligations.

An "Illinois Retailer" is one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois Retailer is then liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by the purchasers.

Another type of retailer is the retailer maintaining a place of business in Illinois. The definition of a "retailer maintaining a place of business in Illinois" is described in 86 Ill. Adm. Code 150.201(i). This type of retailer is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801. The retailer must collect and remit Use Tax to the State on behalf of the retailer's Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The United States Supreme Court in *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's tax laws. The Supreme Court has set out a 2-prong test for nexus. The first prong is whether the Due Process Clause is satisfied. Due process will be satisfied if the person or entity purposely avails itself or himself of the benefits of an economic market in a forum state. *Quill* at 1910. The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause. A physical presence is not limited to an office or other physical building. Under Illinois law, it also includes the presence of any agent or representative of the seller. The representative need not be a sales representative. Any type of physical presence in the State of Illinois, including the vendor's delivery and installation of his product on a repetitive basis, will trigger Use Tax collection responsibilities. Please refer to *Brown's Furniture, Inc. v. Wagner*, 171 Ill.2d 410, (1996).

The final type of retailer is the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax laws. A retailer in this situation does not incur Retailers' Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois

customers. However, the retailer's Illinois customers will still incur Use Tax liability on the purchase of the goods and have a duty to self-assess and remit their Use Tax liability directly to the State.

I hope this information is helpful. If you require additional information, please visit our website at www.tax.illinois.gov or contact the Department's Taxpayer Information Division at (217) 782-3336. If you are not under audit and you wish to obtain a binding PLR regarding your factual situation, please submit a request conforming to the requirements of 2 Ill. Adm. Code 1200.110 (b).

Sincerely,

Samuel J. Moore
Associate Counsel

SJM:msk